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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
11 OAKLAND DIVISION

12 UNITED STATES OF AMERICA,	}	Case No. 4:12-CR-00792-YGR
13 Plaintiff,		<u>IN LIMINE MOTION NO. 12</u>
14 vs.		HENRY CERVANTES'S MOTION FOR
15 HENRY CERVANTES, et al.,		THE COURT TO RECOGNIZE AND
16 Defendants.		PERMIT CROSS-EXAMINATION AND
17	}	DEFENSE EVIDENCE TO SUPPORT
18		DEFENSES PERMITTED UNDER RICO,
19	}	RICO CONSPIRACY, AND VICAR
		LAWS—A MIX OF STATE AND
	}	FEDERAL DEFENSES
		Dept: The Hon. Yvonne Gonzalez
	}	Rogers, District Judge

20 **I. INTRODUCTION AND STATEMENT OF THE MOTION**

21 The purpose of this motion *in limine*, given that the parties have yet to
22 discuss the substantive law of the case with the Court at any length, is to make sure
23 that the Court puts in place a decision making structure which will permit the
24 defense to develop defenses that are permitted given the nature of the charges in
25 this case. As the Court is aware, this case charges a series of conspiracy charges,
26 including conspiracies to “conduct and participate” in the affairs of a racketeering
27 enterprise (Count 1); conspiracies to commit violent crimes in aid of racketeering
28 (Counts 2 and 3, as examples); and the commission of violent crimes in aid of

**IN LIMINE MOTION NO. 12—MOTION FOR THE COURT TO RECOGNIZE AND PERMIT CROSS-
EXAMINATION AND DEFENSE EVIDENCE TO SUPPORT DEFENSES PERMITTED UNDER RICO,
RICO CONSPIRACY, AND VICAR LAWS—A MIX OF STATE AND FEDERAL DEFENSES**

1 racketeering (Counts 5 and 6, as specific to Henry Cervantes).

2 Mr. Cervantes has already filed briefing with the Court demonstrating that
3 the Ninth Circuit recognizes both voluntary intoxication and diminished capacity as
4 bases on which to negate specific intent. *United States v. Twine*, 853 F.2d 676 (9th
5 Cir., 1988) [“...Twine was entitled to have his mental defect evidence considered
6 on the issue of whether he possessed the mental capacity to form the specific intent
7 to threaten members of the group home and to transmit his threats.” [Footnote
8 omitted.] *Id.*, at 680.] The Ninth Circuit Model Jury Instruction 6.8 covers both
9 intoxication and ‘abnormal mental condition’ and makes these available “...in
10 deciding whether the Government has proved beyond a reasonable doubt that the
11 defendant acted with the intent to commit [the crime charged.]”

12 *Twine*, however, covers a defense recognized by a Federal Circuit Court.
13 Thus, for example, when the Ninth Circuit ruled in *U.S. v. Kane*, 399 F.2d 730, 736
14 (9th Cir., 1968), that intoxication is available to negate specific intent where the
15 accused has been charged with murder, the court is referencing defenses as these
16 are applied in most Federal cases involving purely Federal statutes.

17 A racketeering case, however, incorporates state law, and thus a
18 complication is raised where the charge, of necessity, incorporates state law and a
19 violation of state statutes. As the District Court explained in *United States v.*
20 *Slocum*, 486 F.Supp.2d 1104, 1108 (C.D.Cal., 2007), affirmed in *United States v.*
21 *Houston*, 648 F.3d 806, 816 (9th Cir., 2011), because RICO statutes define
22 racketeering activity to involve acts or threats involving murder which are
23 chargeable under state law, the court looks at state law in assessing defenses
24 against violations of state law incorporated into the charges as predicate acts.

25 As a result, the Henry Cervantes defense, is concerned to make sure that it
26 will be permitted to defend this case according to the law of the Circuit, initiates
27 the discussion now in order to ensure that it can cross-examine Government
28 witnesses to begin to develop its defense, and then present its own witnesses for the

1 same purpose.

2 **II. ARGUMENT AND AUTHORITIES**

3 This motion makes reference to the Ninth Circuit's decision in *United States*
 4 *v. Houston*, 648 F.3d 806, in part because that case involved charges that included
 5 a racketeering conspiracy and charges of violent crimes in aid of racketeering. As
 6 the Ninth Circuit noted, the appellants in the case had been convicted of
 7 substantive RICO, and a RICO conspiracy predicated on a conspiracy to murder,
 8 and on two counts of VICAR murder. *Id.*, at 811-13. In that case, the law of
 9 Pennsylvania as well as the law of California was incorporated into the indictment.
 10 As the Ninth Circuit explained: "...California law governs the availability of a [...]
 11 defense for the predicate racketeering acts of conspiracy to commit murder in
 12 violation of [California statutes]....Federal law governs the availability of the
 13 defense for the RICO conspiracy and VICAR murder charges." *Id.*, at 816-17.

14 Other cases have discussed the complexities raised when racketeering
 15 charges of some kind are involved and there is an indictment that incorporates state
 16 charges. This point was acknowledged by the Second Circuit in *U.S. v. Carrillo*,
 17 229 F.3d 177 (2d Cir., 2000), when it explained that "it is difficult to see...how the
 18 defendant could be properly convicted if the conduct found by the jury did not
 19 include all elements of the state offense since RICO requires that the defendant
 20 have committed predicate acts 'chargeable under state law'...." *Id.*, at 184. The
 21 Fourth Circuit also concluded some time ago that it was correct for a District Court
 22 to instruct according to state law criteria on state offenses incorporated into a
 23 substantive RICO count. *U.S. v. Celestine*, 43 F.App'x 586, 591-92 (4th Cir.,
 24 2002).

25 As discussed at some length by the Second Circuit in the above-referenced
 26 *Carrillo, supra*, case, it is in part because of the way that racketeering laws were
 27 enacted, and also because of the way cases are charged, that the issues presented
 28 become complicated by the incorporation of state law. The Second Circuit noted

1 that: “Refusal to incorporate state procedural and evidentiary requirements has no
 2 logical bearing on the issue whether in a federal RICO prosecution the government
 3 must prove the elements of the state law offense that serves as a predicate
 4 racketeering act.” *Id.*, at 183-84. This point was reflected on at some length by
 5 Judge Johnston’s lengthy analysis of the issue in *U.S. v. Barbieto*, 2010 U.S. Dist.
 6 LEXIS 55688 (S.D.W.Va, 2010), an unpublished racketeering case order that
 7 reviews at great length the advent of the racketeering laws, and the question of the
 8 role state law plays in defining any part of a Federal case that incorporates state
 9 crime definitions into racketeering related charges. The most succinct discussion
 10 of the issue is found in the Ninth Circuit’s decision in *United States v. Houston*,
 11 *supra*, 648 F.3d 806, 813-16. Since, as the Ninth Circuit puts it, state law governs
 12 the availability of defenses for the predicate racketeering acts incorporated into the
 13 substantive RICO charge.

14 As Judge Johnston explained it in *Barbieto, supra*, VICAR and RICO need
 15 to be construed together, and where a predicate crime of violence is incorporated
 16 into either a RICO or VICAR charge, “...if the alleged crime of violence does not
 17 violate the elements of a state law, it cannot form the basis for a VICAR charge.”
 18 Unpublished decision, at pp. 16-22. This view, incidentally, appears to be
 19 consistent with the publication by the United States Department of Justice,
 20 Organized Crime and Racketeering Section, of its *Manual for Federal Prosecutors*,
 21 *Violent Crimes in Aid of Racketeering* (December 2006). That manual explains
 22 that in order to be certain that a Section 1959 charge based on a violation of state or
 23 federal law satisfies the definition of the predicate violent crimes listed in Section
 24 1959, “...the government must prove, and the jury must be instructed on, all the
 25 requisite elements of that state or federal offense.”¹

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 27 ¹ The manual at issue is attributed to authors Marine, Crow, and Lee, and appears
 28 on the website www.justice.gov. In reviewing the issues discussed here, the manual at
 issue quotes extensively from *Carrillo, supra*. (Manual, at pp.24-25.)

PROOF OF SERVICE

I, Melissa Stern, declare:

That I am over the age of 18, employed in the County of San Francisco, California, and not a party to the within action; my business address is Suite 350, 507 Polk Street, San Francisco, California 94102.

On today's date, I served the within document entitled:

IN LIMINE MOTION NO. 12–HENRY CERVANTES’S MOTION FOR THE COURT TO RECOGNIZE AND PERMIT CROSS-EXAMINATION AND DEFENSE EVIDENCE TO SUPPORT DEFENSES PERMITTED UNDER RICO, RICO CONSPIRACY, AND VICAR LAWS–A MIX OF STATE AND FEDERAL DEFENSES

() By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, CA, addressed as set forth below;

(X) By electronically transmitting a true copy thereof;

() By having a messenger personally deliver a true copy thereof to the person and/or office of the person at the address set forth below.

Joseph Alioto, Jr., Assistant U.S. Attorney
Robert S. Tully, OCGS Trial Lawyer

All defense counsel through ECF

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this January 5, 2016, at San Francisco, California.

Signed: /s/ Melissa Stern
Melissa Stern